

**DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT****Office of the Assistant Secretary for Public and Indian Housing****24 CFR Parts 950 and 990**

[Docket No. FR-3647-P-04]

RIN 2577-AB44

**Low-Income Public and Indian Housing—Vacancy Rule**

**AGENCY:** Office of the Assistant Secretary for Public and Indian Housing, HUD.

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule would establish new conditions under which a Public Housing Agency (PHA), an Indian Housing Authority (IHA), or Resident Management Corporation (RMC) could include vacant units in its computation of eligibility under the Performance Funding System (PFS). (Note: The term housing authority (HA) will be used in this proposed rule when referring to both PHAs and IHAs.) The proposed rule would give greater recognition to units that are vacant for reasons beyond the HA's control, make changes in the current treatment of vacant units that are part of a modernization program, and, under certain circumstances, have HAs exclude long-term vacant units from their inventory of units available for occupancy. The changes being proposed are based on the recommendations of a regulatory negotiation advisory committee composed of persons who represent the interests affected by the current vacancy rule.

**DATES:** Comments due date: August 18, 1995.

**ADDRESSES:** Interested persons are invited to submit comments regarding this proposed rule to the Rules Docket Clerk, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410-0500. Communications should refer to the above docket number and title. Facsimile (FAX) comments are *not* acceptable. A copy of each communication submitted will be available for public inspection and copying between 7:30 a.m. and 5:30 p.m. weekdays at the above address.

**FOR FURTHER INFORMATION CONTACT:** Mr. John T. Comerford, Director, Financial Management Division, Public and Indian Housing, Room 4210, U.S. Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410, telephone (202)

708-1872. Hearing- or speech-impaired individuals may call HUD's TDD number: (202) 708-0850. [These telephone numbers are not toll-free.]

**SUPPLEMENTARY INFORMATION:****Paperwork Reduction Act Statement**

The information collection requirements contained in this proposed rule have been submitted to the Office of Management and Budget (OMB) for review under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501-3520). No person may be subjected to a penalty for failure to comply with these information collection requirements until they have been approved and assigned an OMB control number. The OMB control number, when assigned, will be announced by separate notice in the **Federal Register**.

Public reporting burden for the collection of information requirements contained in this rule is estimated to include the time for reviewing the instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Information on the estimated public reporting burden is provided under the Preamble heading, *Other Matters*. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Department of Housing and Urban Development, Rules Docket Clerk, 451 Seventh Street SW., Room 10276, Washington, DC 20410-0500; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for HUD, Washington, DC 20503.

**Justification for Shortened Comment Period**

It is the general practice of the Department to provide a 60-day public comment period on all proposed rules. However, the Department is shortening its usual 60-day public comment period to 30 days for this proposed rule. By statute, the rule cannot become effective unless it is in place at the beginning of the housing authority's (HA's) fiscal year. Because a number of HAs affected by this rule have fiscal years beginning on October 1, 1995, the Department wants to publish a final rule, which is not permitted to become effective for 30 days after publication, so that it will be effective by that date. The Department believes that because the rule has been developed by a consensus process, there is not likely to be much objection to its general provisions and that, therefore,

the 30 days allowed for comment will be sufficient.

**Regulatory Review Initiative**

This proposed rule has been developed through negotiated rulemaking, sometimes referred to as regulatory negotiations or "reg-neg." Negotiated rulemaking is a relatively new process for the Federal government and this was the first use of the process at HUD. The basic concept of reg-neg is to have the agency that is considering drafting a rule bring together representatives of affected interests for formal face-to-face negotiations that are open to the public. The give-and-take of the negotiation process is expected to foster constructive, creative, and acceptable solutions to difficult problems. As such, this proposed rule represents a serious effort by Department and affected interests to draft a clear, comprehensive rule that meets the needs of the program and its participants.

Consistent with Executive Order 12866 and the President's memorandum of March 4, 1995, to all Federal Departments and Agencies on the subject of Regulatory Reinvention, the Department is reviewing each of its regulations to determine whether the regulation is a candidate for elimination, streamlining, or consolidation. As part of this review, at the final rule stage this rule may undergo revisions in accordance with the President's regulatory reform initiatives. Therefore, in addition to comments on the substance of this proposed rule, the Department welcomes comments on ways, if any, that the rule may be made more understandable and less burdensome, while still assuring the goals of the Performance Funding System (PFS).

**Background**

HUD uses a formula approach called the Performance Funding System (PFS) to distribute operating subsidies to housing agencies. A regulatory description of the PFS can be found at 24 CFR parts 950, subpart J, and 990. Although somewhat oversimplified, the amount of subsidy received by an HA is the difference between projected expenses and projected income, with the PFS regulations detailing how these projections will be made. HAs calculate their PFS eligibility annually and submit a request for funding as part of their budget process. While the amount varies, this subsidy can represent a substantial amount of revenue to an HA. In 1994, HUD distributed over \$2.6 billion in operating subsidies to HAs.

The amount of dwelling rental income an HA expects to receive is an important element in estimating subsidy eligibility. If rental income increases, operating subsidy eligibility will generally decrease. Likewise, if rental income decreases, an HA may receive a greater amount of subsidy. With some exceptions, HUD expects that HAs will project an occupancy level of 97 percent. This standard of 97% has been part of the PFS since its implementation in 1975.

That part of the PFS that deals with the projection of occupancy levels is known as the vacancy rule. The vacancy rule was published as a final rule in 1986 (51 FR 16835, May 7, 1986) and was intended to create incentives to HAs to return vacant units to occupancy and to maintain an occupancy level of 97% or higher. The rule provided these incentives by: defining the conditions under which HUD would approve the use of an occupancy level of less than 97%; specifying that an HA need not use an occupancy level higher than 97%; and, in recognition that a low number of vacancies may make it difficult for a small HA to reach 97%, allowing small HAs to use an occupancy percentage based on having 5 or fewer vacant units.

In September 1991, HUD published a proposed rule (56 FR 45814, September 6, 1991) that would have made significant changes to the way in which vacant units would be considered eligible for operating subsidy. These proposed changes would have included:

1. Increasing the occupancy standard from 97% to 98%;
2. Eliminating HUD-approved Comprehensive Occupancy Plans (COPs) as a means to justify using less than the prescribed occupancy standard;
3. Limiting the amount of subsidy paid for those vacant units that are greater than 2% of the total number of units available for occupancy; and
4. Instituting a year-end review to compare the HA's actual occupancy achieved with its projected occupancy percentage.

Before the comment period on the proposed rule expired, Congress inserted language in HUD's Appropriation Act for 1992 (105 Stat. 757) that prohibited HUD from using appropriated funds to implement the proposed rule. Later, Congress included a provision in the Housing and Community Development Act of 1992 (section 114(b), Pub. L. 102-550; 42 U.S.C. 1437g(a)(3)(A)) that required that any changes to the PFS relating to the payment of operating subsidies to vacant public housing units be

accomplished only through the use of negotiated rulemaking procedures.

### Regulatory Negotiations

In July 1994, HUD entered into an Interagency Agreement with the Federal Mediation and Conciliation Service (FMCS) for convening services that would assist HUD in assessing the feasibility of assembling a balanced committee willing and able to work towards the goal of consensus on a proposed vacancy rule that was within HUD's statutory authority and addressed the issues of the interested parties. If HUD proceeded with the formation of a negotiated rulemaking committee, the Interagency Agreement called for the FMCS to provide facilitating services.

The final convening report was provided to HUD in September 1994 and concluded that "there is sufficient support to re-examine the vacancy rule through a regulatory negotiations process." A copy of the report titled *Convening Report for Regulatory—Negotiations on HUD's Vacancy Rule* is in the office of the Rules Docket Clerk.

### Chartering of Reg-Neg Committee

As a general rule, a Federal Department is required to comply with the requirements of the Federal Advisory Committee Act (FACA), Pub. L. 92-463, 5 U.S.C. App., when it establishes or uses a group of non-Federal members as a source of advice. Under FACA, HUD was required to request a charter for this reg-neg committee. Approval of the charter submitted by HUD to the Office of Management and Budget was given on February 23, 1995.

### Substantive Issues for Negotiation

The convening report identified the following issues to be addressed by the Committee:

- What constitutes an acceptable level of vacancies for housing authorities of various size classifications?
- What criteria should be used for providing less than full subsidy?
- What criteria should be used for providing full subsidy despite less than full occupancy?

### Committee Membership

The FMCS conveners consulted and interviewed over 30 officials of various organizations interested in and affected by the vacancy rule. Three national HA associations—the Council of Large Public Housing Authorities (CLPHA), the National Association of Housing and Redevelopment Officials (NAHRO), and the Public Housing Authority Directors

Association (PHADA)—worked together to suggest executive directors of HAs for committee membership that would reflect a balance among HAs in terms of size and number of vacant units. The national associations committed themselves to serving as staff support to the HAs selected for membership.

The members of the Committee were:

- Housing Agencies

Housing Authority of the City Of Houston (TX)  
Cuyahoga Metropolitan Housing Authority (Cleveland, OH)  
Housing Authority of the Birmingham District (AL)  
New York City Housing Authority (NY)  
Housing Authority of the City of Newark (NJ)  
Housing Authority of the City of Reno (NV)  
Housing Authority of the City of Littleton (CO)  
Housing Authority of the City of South Bend (IN)

- Tenant Organizations and Public Interest Groups

Bromley Heath Tenant Management Corporation, Jamaica Plain, MA  
New Jersey Association of Public and Subsidized Housing Residents, Inc.  
Housing and Development Law Institute, Washington, DC  
Illinois Association of Housing Authorities

- Federal Government

U.S. Department of Housing and Urban Development

### Development of Proposed Rule

The first meeting of the Committee took place March 7-9, 1995, in Washington, DC. The FMCS conveners also served as facilitators for the Committee. Committee members agreed to a set of protocols that covered the areas of participation, decisionmaking, meetings, the role of the FMCS facilitators, and the intended product of the negotiations. The Committee agreed to define consensus as unanimous agreement to advance a specific proposal as the Committee's recommendation on any given point. As framed by one member, the goal of the negotiation should be a proposed rule that makes sense to all committee members or, alternatively, no proposed rule at all.

The Committee members then began a discussion among themselves over possible issues that needed to be addressed. The FMCS facilitators used a variety of techniques, including brainstorming, supposition, and suggestion, to have the group focus on what the general objective or objectives should be for a new vacancy rule and

to develop a list of factors that would make it possible to achieve the objectives. Points of discussion included:

1. The appropriateness of the current occupancy standard of 97% and the use of five or fewer vacant units in determining the occupancy percentage for small HAs.

2. Circumstances that create vacant units or cause vacant units to remain vacant for long periods of time. These included modernization, turnover, litigation, legislation, insurance claims, natural disasters, and market factors.

3. Circumstances or causes of vacancies that would warrant continuation of some level of subsidy payment.

4. Recognition of direct costs that are incurred by an HA regardless of the level of its vacancies.

5. Factors that could be incorporated into a vacancy rule that would promote the occupancy of vacant units.

6. Circumstances under which waivers of the regulatory provisions would be permitted.

The discussion process continued throughout the afternoon of the first day's session. The Committee reached consensus on retaining the provisions of the current rule with respect to small HAs being able to use an occupancy percentage of less than 97%, if the percentage is based on having five or fewer vacant units. The Committee, recognizing budgetary realities, rejected as not feasible or productive the possibility of redefining the 97% occupancy goal at a different optimum level.

A synopsis of the first day's efforts to develop a new vacancy rule was presented to the Committee by the facilitator at the start of the second day. The Committee, under the guidance of the facilitator, used the synopsis as a starting point to continue its discussion. Discussion included how litigation, Federal and State legislation, and regulatory action can serve as barriers to vacant units or buildings being reoccupied, demolished, sold, consolidated, or modernized.

Much of the discussion during the second morning segment was on the issue of vacant units that were undergoing modernization or were being scheduled for modernization. The Committee viewed modernization as a positive undertaking on the part of HAs to reduce vacancies, for which continued subsidy support is appropriate at some level. Topics discussed under this issue included sources of funding; scheduling of work and the ability of an HA to control its modernization; what constitutes a

reasonable period of time in advance of modernization work for vacating occupied units or not reoccupying vacant units; and the treatment of small HAs that compete for modernization funding, where the resources may be insufficient to fund all approvable applications.

The facilitator prepared a new synopsis for the Committee to use as it began the second afternoon segment of the negotiations. After reviewing the synopsis, the Committee started to discuss the circumstances under which it would be reasonable to receive full or partial subsidy funding for vacant units. Full or partial subsidy was understood to mean receiving 100% or some lower level of the current Allowable Expense Level (AEL). A chart that presented the various cost items that comprise the AEL was provided to the Committee for its use. The Committee discussed whether and to what extent certain costs would be applicable to vacant units undergoing modernization, excess vacant units or empty buildings not undergoing modernization.

For partial funding purposes, the Committee agreed that the determination of the appropriate partial amount should be expressed in terms of a percentage of the AEL, and not in terms of reimbursement of actual allowable costs, because of the administrative burden that a direct reimbursable system would entail. The Committee then discussed various levels of partial subsidy support and whether it was reasonable to apply one partial subsidy level to all the different scenarios under consideration (vacant units undergoing modernization, excess vacant units, or empty buildings not undergoing modernization).

During the discussion the point was made that the current vacancy rule permits vacant units that are part of a funded, on-schedule modernization program to receive full funding. The Committee agreed to full subsidy eligibility for vacant units undergoing modernization, if the units have to be vacant in order to accomplish the work and the units are included in a HUD-approved modernization budget. The HA must place the vacant units under construction within two Federal Fiscal Years (FFYs) of funding approval. The Committee discussed a proposal to permit vacant units proposed for rehabilitation in the second year of an HA's Five-Year Action Plan to be eligible for full funding, but rejected the idea because of the annual cycle of Federal appropriations. Discussion continued on what partial subsidy level would be sufficient for the HA to maintain the structural integrity of

vacant buildings/units in other circumstances. The session ended with an agreement to revisit this topic the following day.

The third day's session began with a discussion by members on whether a new vacancy rule should contain a section describing the general circumstances under which a waiver might be given. The Committee felt that there may be circumstances beyond an HA's or Resident Management Corporation's (RMC) control that have brought about a vacancy problem that, despite the HA's/RMC's documented best efforts, is not correctable or would place an unreasonable burden on the HA/RMC. The Committee agreed that the procedures and the documentation needed for obtaining a waiver would not be part of the new rule, but would be contained in a notice.

An updated synopsis was presented to the Committee for review and discussion. The Committee then returned to the issue of partial subsidies and agreed that an appropriate level of subsidy support would be 20% of the AEL. The Committee agreed that this level of support would be applied against vacant units that have been vacant for more than 12 months and were not undergoing modernization or were not vacant due to circumstances beyond the HA's control. These long-term vacant units will be removed from the HA's inventory of unit months available (UMAs). However, the Committee noted and emphasized that full funding of utilities under the current PFS would be continued. The Committee also agreed that the new vacancy rule would eliminate the current provisions regarding Comprehensive Occupancy Plans (COPs) and reiterated that units approved by HUD for deprogramming would not be included in the calculation of UMAs. A final synopsis containing all the consensus agreements made to that date was prepared for the Committee.

The second meeting of the Committee took place April 4-5, 1995, in Washington, DC. The meeting began with a discussion on whether the proposed rule language should reflect consequences that could occur if funds already appropriated by Congress for the Comprehensive Grant Program (CGP) were rescinded. If funds for the CGP were to be significantly decreased, HAs might have to delay placing some vacant units under a construction contract. This could lead to the HA having long-term vacancies that would not be eligible for full operating subsidy. The Committee agreed to language that

would permit the HA to seek a waiver to deal with this situation.

The Committee also discussed the treatment of Resident Management Corporations (RMCs) that have responsibility for administering modernization programs, but are dependent upon the HA to provide funding. The Committee found that there are parallels between requests made by HAs for Comprehensive Improvement Assistance Program (CIAP) funds and requests made by RMCs for CGP funds, in that an otherwise approvable application or request could be denied because of insufficient funding. The Committee agreed to language that would treat this situation as a circumstance or action that was beyond the RMC's control.

The Committee then began a section-by-section review of the proposed rule language that had been prepared by HUD staff based on the agreements reached at the first meeting. Edits and clarifications were proffered for incorporation into a new draft. The Committee then followed the same process in its review of the preamble material.

A copy of the approved minutes is available for public inspection and copying from the Department's Rules Docket Clerk (see ADDRESSES in this preamble).

#### Components of Proposed Rule

The following elements of the proposed rule evolved from the consensus-seeking process applied in the reg-neg Committee. Although the Committee recognized that there are anomalies that will not be reached by the general elements of this proposed rule, its provisions were developed to address the majority of the situations facing HAs.

(1) The standard for expected occupancy will continue to be 97%. The proposed rule would also maintain the five-unit exception, as in the current regulation, for small HAs where small numbers of vacant units would make it extremely difficult to attain a 97% occupancy rate.

(2) HAs will be allowed to take into consideration circumstances and actions beyond the HA's control that prohibit the HA from occupying, selling, demolishing, rehabilitating, reconstructing, consolidating, or modernizing vacant units. Such circumstances and actions are limited to:

(a) *Litigation*, such as a court order or settlement agreement that is legally enforceable. Units that are being held vacant as part of a court-ordered or

HUD-approved desegregation effort would be an example.

(b) *Laws*. Federal, Tribal, or State laws of general applicability, or their implementing regulations. For example, demolition or disposition requirements that have the effect of preventing an HA from taking action to remove unusable units from its inventory may be considered a circumstance beyond the HA's control. However, units vacant only because they do not meet minimum standards pertaining to construction or habitability under Federal, State, or local laws or regulations will not be considered vacant due to circumstances and actions beyond the PHA's control.

(c) *Changing market conditions*. For example, small PHAs that are located in areas experiencing population loss or economic dislocations may face a lack of demand in the foreseeable future, even after the HA has taken aggressive marketing and outreach measures.

(d) *Natural disasters*.

(e) *Insufficient funding* for otherwise approvable applications made for Comprehensive Improvement Assistance Program (CIAP) funds.

(f) *RMC Funding*. The failure of a PHA to fund an otherwise approvable RMC request for Federal modernization funding.

(g) *Casualty Losses*. Delays in repairing damage to vacant units due to the time needed for settlement of insurance claims.

(3) An HA with vacant units in a project that is otherwise viable, but is undergoing modernization that includes work necessary to reoccupy the vacant units will not be penalized for the vacancies when the HA determines its operating subsidy eligibility, if one of the following conditions is met:

(a) The vacant units are under construction (i.e., construction contract awarded or force account work started); or

(b) Treatment of the vacant units is included in a HUD-approved modernization budget (e.g., an approved Annual Statement for the Comprehensive Grant Program (CGP) or CIAP Budget), but the time period for placing the vacant units under construction has not yet expired. The HA must place the vacant units under construction within two Federal Fiscal Years (FFYs) after the FFY in which the modernization funds are approved. For example, if the HA receives HUD approval for the modernization budget in FFY 1996, the HA must start construction on the vacant units by September 30, 1998. If the HA fails to place the vacant units under construction within this 2-year time

frame, the units will be treated as long-term vacancies and the HA is eligible for limited subsidy for those units.

The 2-year provision to place vacant units under construction will not be extended. Failure to meet this provision affects subsidy eligibility only, not the use of the modernization funds, which are governed by a modernization implementation schedule that may be longer than 2 years.

Because of the funding cycle for modernization funds, HAs with FYs beginning January 1 or April 1 may not have approved modernization budgets at the time they develop operating budgets for those years. These HAs would use their current approved modernization budget to determine their subsidy eligibility, but would be permitted to submit an operating budget revision when the modernization budget had been approved.

(4) Any HA that estimates it will have vacant units in its requested budget year in excess of 3% of the units available for occupancy (and in excess of five vacant units), after adjusting for units that are vacant for reasons beyond its control (as described in item 2 under this heading), and vacant units that are covered by funded modernization (as described in item 3 under this heading), will receive less than full operating subsidy for these vacant units. If a unit has been vacant for longer than 12 months, it will be removed from the HA's calculation of units available for occupancy and subsidy eligibility will be limited to 20% of the Allowable Expense Level. Units that are vacant for 12 months or less will be included in the HA's calculation of units available for occupancy, but the HA will have to presume dwelling rental income will be generated by these units.

(5) Provisions in the current vacancy rule relating to Comprehensive Occupancy Plans (COPs) will be eliminated. An HA that has a HUD-approved COP at the time the new vacancy rule becomes effective may choose to determine its PFS eligibility under the existing rule or to terminate its COP and become subject to the new rule.

(6) Because the 2-year provision to place vacant units under construction is new, the proposed rule contains a transition section to address the treatment of units already under an approved modernization budget at the time the new rule becomes effective. Such units may have a longer time period, if already approved by HUD.

(7) The new vacancy rule would permit the granting of waivers to HAs or RMCs when necessary to address unusual situations. HUD will establish

procedures for requesting a waiver and required documentation. HUD will take prompt action in responding to a waiver request, and any relief provided will be in accordance with these procedures and at a level established at HUD's discretion on a case-by-case basis.

### Computation of Subsidy Under Proposed Rule

In computing its per-unit Dwelling Rental Income under the Performance Funding System, an HA will determine its Projected Occupancy Percentage in much the same manner as in the current rule. The HA will either take a "snapshot" of the last day of the month which is 6 months before the start of its fiscal year or take the average occupancy during that month. The HA will then use the data to develop an estimated average occupancy percentage for its Requested Budget Year (RBY). The conditions under which the RBY occupancy percentage will be used as the projected occupancy percentage for purposes of determining operating subsidy eligibility are described below:

(1) If the RBY percentage is 97% or higher, the HA will use 97% as its projected occupancy percentage. If the HA estimates a RBY percentage of less than 97% but can demonstrate that it will have an average of five or fewer vacant units in the requested budget year, the HA may use its RBY percentage as its projected occupancy percentage. (Reference in this part to "more than five units" or "fewer than five units" refers to a circumstance in which 5 units equals or exceeds 3% of the number of units to which the 3% threshold is applicable.)

*Example:* The ABC Housing Authority has 1,000 units available for occupancy. It estimates for its RBY an average of 980 units will be occupied, an occupancy rate of 98%. Since the RBY percentage is higher than 97%, it will use 97% as its projected occupancy percentage.

*Example:* The XYZ Housing Authority has 50 units available for occupancy. It estimates that for its RBY an average of 46 units will be occupied; a RBY occupancy percentage of 92%. Since the Authority estimates that it will have four vacant units in the RBY, it will use 92% as its projected occupancy percentage.

(2) If the RBY occupancy percentage is less than 97% and the HA has more than 5 vacant units, the HA will adjust its estimate of vacant units to exclude units undergoing modernization. (see item 3 under the section of the preamble headed *COMPONENTS OF PROPOSED RULE*). The HA will also adjust its estimate for units that are vacant due to circumstances and actions beyond the HA's control (see item 2 under the

section of the preamble headed *COMPONENTS OF PROPOSED RULE*). After making these adjustments, the HA will recalculate its estimated vacancy percentage. If the recalculated vacancy percentage is 3% or less (or the HA would have five or fewer vacant units), the HA will use its RBY occupancy percentage as its projected occupancy percentage.

*Example:* The ABC Housing Authority has 1,000 units available for occupancy. It estimates that for its RBY an average of 950 units will be occupied, a RBY occupancy percentage of 95%. Of its 50 vacant units, 40 units are part of a HUD-approved modernization budget and will be under a construction contract during the budget year. The Authority will adjust its 50 vacancies to exclude the 40 vacant units undergoing modernization and recalculate its RBY vacancy percentage ( $10/1,000 = 1\%$ ). Since the recalculated RBY vacancy percentage is less than 3%, the Authority will use its RBY occupancy percentage of 95% as its projected occupancy percentage.

*Example:* The XYZ Housing Authority is a small HA with 50 units available for occupancy. It estimates for its RBY an average of 40 units will be occupied, a RBY occupancy percentage of 80%. The Authority documents that 5 of the vacancies are efficiencies in a building serving elderly residents. There is no demand for these units despite aggressive marketing and outreach and selling, demolishing, or reconfiguration of the units is not possible. Since the Authority can show that these 5 vacancies are due to circumstances or action beyond its control, it will adjust its 10 vacancies to exclude these 5. With the number of vacant units now recalculated to be 5, the Authority will use its RBY occupancy percentage of 80% as its projected occupancy percentage.

(3) If the RBY vacancy percentage is greater than 3% and the HA has more than 5 vacant units, even after adjusting for vacant units undergoing modernization or units vacant due to circumstances and actions beyond its control, the HA will then recalculate its RBY occupancy percentage by excluding from its calculation of units months available (UMAs), all vacant units that have been vacant for longer than 12 months that are not either undergoing modernization or vacant for reasons beyond the HA's control. The long-term vacancies removed will be eligible to receive a reduced operating subsidy calculated at 20% of the HA's AEL. The conditions under which the recalculated RBY occupancy percentage will be used as the projected occupancy percentage for purposes of determining operating subsidy eligibility for a low-occupancy HA are described below:

(a) If the recalculated RBY occupancy percentage estimate is 97% or higher, the HA will use 97%.

*Example:* The ABC Housing Authority has 1,000 units available for occupancy. It estimates for its RBY an average of 950 units will be occupied, a RBY occupancy percentage of 95%. The 50 vacant units do not meet the criteria of being either vacant units undergoing modernization or vacant due to circumstances or actions beyond the HA's control. There are 25 long-term vacancies in the group of 50. The Authority will remove these 25 units from its determination of units available for occupancy and recalculate its RBY occupancy percentage ( $950/975 = 98\%$ ). Since the RBY occupancy percentage is higher than 97%, it will use 97% as its projected occupancy percentage.

(b) If the recalculated RBY occupancy percentage is less than 97%, but the RBY vacancy rate after adjusting for vacant units undergoing modernization and units that are vacant due to circumstances and actions beyond the HA's control is 3% or less (or the HA has five or fewer vacant units), the HA may use its recalculated RBY Occupancy Percentage as its projected occupancy percentage.

*Example:* The ABC Housing Authority has 1,000 units available for occupancy. It estimates for its RBY that an average of 900 units will be occupied, a RBY occupancy percentage of 90%. Of its 100 vacant units, 50 units are part of a HUD-approved modernization budget and will be under a construction contract during the budget year. The remaining 50 units fall outside the definition of being vacant due to circumstances or actions beyond the HA's control: 25 of these units have been vacant for more than 12 months (long-term vacancies) and 25 have been vacant for 12 months or less. When the Authority excludes its long-term vacancies from its inventory of units available for occupancy and recalculates its RBY occupancy percentage, it finds that the recalculated RBY occupancy percentage is still below 97%, ( $900/975 = 92\%$ ). The Authority will then take its 75 vacancies, exclude the 50 vacant units undergoing modernization, and recalculate its RBY vacancy percentage. Since the resulting vacancy percentage is 3% or below ( $25/975 = 3\%$ ), the Authority will use its recalculated RBY occupancy percentage of 92% as its projected occupancy percentage.

(c) If the vacancy percentage is greater than 3% and the HA has more than five vacant units after adjusting for vacant units undergoing modernization and units that are vacant due to circumstances and actions beyond the HA's control, the HA will use 97% as its projected occupancy percentage, but will be allowed to adjust the 97% by the number of vacant units undergoing modernization and units that are vacant due to circumstances and actions beyond the HA's control. For a small HA using five vacant units as its occupancy objective for the RBY, the HA will determine what percentage five

units represents as a portion of its units available for occupancy and subtract that percentage from 100%. The result will be used as the HA's projected occupancy percentage; however, the HA will be allowed to adjust the projected occupancy percentage by vacant units undergoing modernization and units that are vacant for circumstances and actions beyond the HA's control.

*Example:* The ABC Housing Authority has 1,000 units available for occupancy. It estimates for its RBY an average of 900 units will be occupied, a RBY occupancy percentage of 90%. Of its 100 vacant units, 50 units are part of a HUD-approved modernization budget and will be under a construction contract during the budget year. The remaining 50 units fall outside the definition of being vacant due to circumstances or actions beyond the HA's control; none of the vacancies are long-term vacancies. The Authority will have to use a

projected occupancy percentage of 97%, but will adjust the 97% by the number of vacant units undergoing modernization. The 50 vacant units undergoing modernization represent 5% of the Authority's inventory and the 5% will be subtracted from the 97%. The Authority will use 92% as its projected occupancy percentage.

(4) The relationship between the RBY occupancy percentage and the projected occupancy percentage is illustrated in the chart below:

#### RELATIONSHIP BETWEEN THE RBY OCCUPANCY PERCENTAGE AND THE PROJECTED OCCUPANCY PERCENTAGE

RBY occupancy percentage	Projected occupancy percentage
1. RBY Occupancy Percentage is 97% or higher .....	1. Use 97%.
2. RBY Occupancy Percentage is less than 97%, but HA estimates it will have 5 or fewer vacant units in RBY.	2. Use the RBY Occupancy Percentage.
3. RBY Occupancy Percentage is less than 97% and HA has more than 5 vacant units.	3. Use the RBY Occupancy Percentage if vacancy percentage is 3% or less after adjusting for vacant units undergoing modernization and units vacant due to circumstances and actions beyond the HA's control.
4. RBY Occupancy Percentage is less than 97% and HA has more than 5 vacant units, even after adjusting for vacant units undergoing modernization and units vacant due to circumstances and actions beyond the HA's control.	4. HA will exclude all long-term vacant units from its inventory of units available for occupancy and will recalculate its RBY Occupancy Percentage: <ul style="list-style-type: none"> <li>a. If the recalculated RBY Occupancy Percentage is 97% or higher, the HA will use 97%.</li> <li>b. If the recalculated RBY Occupancy Percentage is less than 97%, but the HA estimates it will have 5 or fewer vacant units in the RBY, the HA will use the RBY Occupancy Percentage.</li> <li>c. If the recalculated RBY Occupancy Percentage is less than 97% and HA has more than 5 vacant units, even after making all adjustments, the HA will use 97%, but will be allowed to adjust the 97% for vacant units undergoing modernization and units vacant due to circumstances and actions beyond the HA's control. A small HA will determine what percentage five units represents as a portion of its units available for occupancy and will make adjustments against that percentage.</li> </ul>

#### Comparison of Current and Proposed Rule

The proposed rule distinguishes itself from the current regulation in several important respects, as follows:

(1) *Conditions under which a vacant unit is considered eligible for subsidy.* The proposed rule would limit the circumstances under which an HA could include excess long-term vacancies in its inventory of units available for occupancy to those units that are: (a) Under construction as part of a modernization program; (b) included in a HUD-approved modernization budget, and the time period for placing the vacant units under construction has not yet expired; or (c) subject to circumstances and actions recognized to be beyond the HA's control. If long-term vacant units are removed from an HA's inventory, those units would be eligible for a reduced subsidy, calculated at 20% of the AEL, and would continue to be eligible for utility costs. Section 990.108(b)(3) describes the eligibility of long-term vacancies for these other

costs. The current rule does not make a distinction in the length of time a unit has been vacant. The Committee believed that a reduced subsidy level of 20% for such vacant units would be sufficient to maintain the structural integrity of the units, but would also provide incentive to returning the units to occupancy as soon as feasible.

(2) *Treatment of vacant units in CIAP, CGP or other funded modernization programs.* Under the existing rule, the Department allows each HA an opportunity to receive special treatment in determining operating subsidy eligibility if the HA has or applies to have vacant units in a funded, on-schedule modernization program. This special treatment has been provided in two ways: first, if an HA anticipates that it will have less than 97% occupancy in its budget year, the HA may be able to use that lower percentage in its operating subsidy calculations, by showing that its occupancy rate would be 97% or higher after adjusting for vacant units in an on-schedule modernization program. Second, if an

HA has a HUD-approved Comprehensive Occupancy Plan (COP), the HA would be permitted to adjust its otherwise fixed occupancy goals if the HA could demonstrate that it had submitted an approvable application for modernization work that was rejected because of insufficient HUD funds. This special treatment has allowed an HA to be eligible for full operating subsidy for vacant units that are undergoing modernization and for units awaiting modernization when funds become available.

The Committee supported the principle embodied in the existing rule, i.e., HAs should not be unduly burdened in undertaking modernization activities because of lost rental revenue. However, the Committee believed that eligibility for full operating subsidy to this group of vacant units should be limited to units that are actually under a construction contract or included in an approved modernization budget. The existing rule does not make this distinction and permits the special treatment when funds are first

committed to the modernization program, often for the development of architectural and engineering (A & E) specifications. The A & E work may cover a number of units, buildings, or projects that will not actually go to construction for some period of time; furthermore, the construction work might not require the unit to be vacant.

(3) *Recognition of Circumstances Beyond an HA's/RMC's Control That Cause Vacancies.* The proposed rule would permit an HA or RMC to be eligible for full operating subsidies for its vacant units if it can show that the circumstances or actions causing the vacancies are beyond the HA's/RMC's control and are prohibiting it from occupying, selling, demolishing, rehabilitating, reconstructing,

consolidating, or modernizing the vacant units. A listing of eligible circumstances is provided in the section of this preamble titled *Components of the Proposed Rule*. The existing regulation gives special recognition only to vacant units in projects with funded, on-schedule modernization programs.

(4) *Elimination of Comprehensive Occupancy Plans (COPs).* Under the proposed rule, no new COPs would be approved. An HA that has a HUD-approved COP at the time the new vacancy rule becomes effective will have the option of choosing to determine its PFS eligibility under the existing rule or to terminate its COP and be subject to the new rule. HAs are still encouraged to undertake the structured, analytical approach encompassed in the

COP concept, i.e., to identify the causes of their vacancy problems and develop vacancy reduction strategies and actions that are responsive to the problems and appropriate to the management and resources of the HA.

#### Other Matters

##### Public Reporting Burden

The information collection requirements contained in this proposed rule have been submitted to the Office of Management and Budget under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501–3520). The Department has determined that the following provisions contain information collection requirements.

TABULATION OF ANNUAL REPORTING BURDEN—CONTRIBUTIONS FOR OPERATING SUBSIDIES—PERFORMANCE FUNDING SYSTEM; LOW-INCOME PUBLIC HOUSING—VACANCY; PROPOSED RULE

Description of information collection	Section of 24 CFR affected	No. of respondents	No. of responses per respondent	Total annual responses	Hours per responses	Total hours
Determining operating income level .....	950.725; 990.109	3,100	1	3,100	1	3,100
Total reporting burden .....	.....	3,100	1	3,100	1	3,100

#### Environmental Impact

In accordance with 40 CFR 1508.4 of the regulations of the Council on Environmental Quality and 24 CFR 50.20(o) of the HUD regulations, the policies and procedures contained in this proposed rule relate only to operating costs that do not affect a physical structure or property and, therefore, are categorically excluded from the requirements of the National Environmental Policy Act.

#### Regulatory Flexibility Act

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this proposed rule before publication and by approving it certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities. The proposed rule would result in eligibility criteria for low-income public and Indian housing operating subsidies that may impact those HAs with large numbers of long-term vacant units. However, HUD's data incident to establishing the Vacancy Reduction Program indicates that high-vacancy PHAs are relatively few in number (and high-vacancy IHAs virtually nonexistent), and that a preponderance of the program's vacancies are in a very

limited number of the larger PHAs. Most HAs will be unaffected by this proposed rule.

#### Executive Order 12612, Federalism

The General Counsel, as the Designated Official under section 6(a) of Executive Order 12612, *Federalism*, has determined that the policies contained in this proposed rule would not have substantial direct effects on States or their political subdivisions, or the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government. As a result, the proposed rule is not subject to review under the Order. The rule will refine the criteria under which operating subsidies are paid on HUD-assisted housing owned and operated by HAs, but will not interfere with State or local government functions.

#### Executive Order 12606, the Family

The General Counsel, as the Designated Official under Executive Order 12606, *The Family*, has determined that this proposed rule would not have potential for significant impact on family formation, maintenance, and general well-being, and, thus, is not subject to review under

the Order. No significant change in existing HUD policies or programs will result from promulgation of this proposed rule, as those policies and programs relate to family concerns. The proposed rule merely involves the amount of funding that an HA should receive under a refinement of an existing procedure.

#### Regulatory Agenda

This proposed rule was listed as Item No. 1526 in the Department's Semiannual Agenda of Regulations published on May 8, 1995 (60 FR 23368, 23402), in accordance with Executive Order 12866 and the Regulatory Flexibility Act.

The Catalog of Federal Domestic Assistance Program numbers for this proposed rule are 14.145, 14.146, and 14.147.

#### List of Subjects

##### 24 CFR Part 950

Aged, Grant programs—housing and community development, Grant programs—Indians, Disability, Homeownership, Indians, Low and moderate income housing, Public housing, Reporting and recordkeeping requirements.



## 24 CFR Part 990

Grant programs—housing and community development, Public housing, Reporting and recordkeeping requirements.

For the reasons set out in the preamble, parts 950 and 990 of title 24 of the Code of Federal Regulations are proposed to be amended as follows:

**PART 950—INDIAN HOUSING PROGRAMS**

1. The authority citation for part 950 would continue to read as follows:

**Authority:** 25 U.S.C. 450e(b); 42 U.S.C. 1437aa–1437ee and 3535(d).

2. Section 950.102 would be amended by adding definitions for “Long-term vacancy”, “Units vacant due to circumstances and actions beyond the IHA’s control”, and “Vacant unit undergoing modernization”, and by revising the definition for “Unit months available”, to read as follows:

**§ 950.102 Definitions.**

\* \* \* \* \*

*Long-term vacancy.* This term means the same as it is used in the definition of “Unit Months Available” in this section.

\* \* \* \* \*

*Unit months available.* Project Units multiplied by the number of months the Project Units are available for occupancy during a given IHA fiscal year. For purposes of this subpart, a unit is considered available for occupancy from the date established as the End of the Initial Operating Period for the Project until the time the unit is approved by HUD for deprogramming and is vacated or is approved for nondwelling use. A unit will be considered a long-term vacancy and will not be considered available for occupancy in any given IHA Requested Budget Year if the IHA determines that:

(1) The unit has been vacant for more than 12 months at the time the IHA determines its Actual Occupancy Percentage;

(2) The unit is not either:

(i) A vacant unit undergoing modernization; or

(ii) A unit vacant for circumstances and actions beyond the IHA’s control, as these terms are defined in this section; and

(3) The IHA determines that it will have a vacancy percentage of more than 3 percent and will have more than five vacant units, for its Requested Budget Year, even after adjusting for vacant units undergoing modernization and units that are vacant for circumstances and actions beyond the IHA’s control, as

defined in this section. (Reference in this subpart to “more than five units” or “fewer than five units” shall refer to a circumstance in which 5 units equals or exceeds 3 percent of the number of units to which the 3 percent threshold is applicable.)

*Units vacant due to circumstances and actions beyond the IHA’s control.* Dwelling units that are vacant due to circumstances and actions that prohibit the IHA from occupying, selling, demolishing, rehabilitating, reconstructing, consolidating or modernizing vacant units and are beyond the IHA’s control. For purposes of this definition, circumstances and actions beyond the IHA’s control are limited to:

(1) *Litigation.* The effect of court litigation such as a court order or settlement agreement that is legally enforceable. An example would be units that are being held vacant as part of a court-ordered or HUD-approved desegregation plan.

(2) *Laws.* Federal, Tribal, or State laws of general applicability, or their implementing regulations. Units vacant only because they do not meet minimum standards pertaining to construction or habitability under Federal, State, or local laws or regulations will not be considered vacant due to circumstances and actions beyond the IHA’s control.

(3) *Changing market conditions.* For example, IHAs may face a lack of demand in the foreseeable future, even after the IHA has taken aggressive marketing and outreach measures.

(4) *Natural disasters.*

(5) *Insufficient funding* for otherwise approvable applications made for Comprehensive Improvement Assistance Program (CIAP) funds.

(6) *Resident Organization Funding.* The failure of an IHA to fund an otherwise approvable RO request for Federal modernization funding;

(7) *Casualty Losses.* Delays in repairing damage to vacant units due to the time needed for settlement of insurance claims.

\* \* \* \* \*

*Vacant unit undergoing modernization.* Except as provided in § 950.775(a), a vacant unit in an otherwise viable project (as determined using the indicia in § 970.6 of this chapter), when the project is undergoing modernization that includes work that is necessary to reoccupy the vacant unit, and in which one of the following conditions is met:

(1) The unit is under construction (i.e., the construction contract has been awarded or force account work has started); or

(2) The treatment of the vacant unit is included in a HUD-approved modernization budget (e.g., the Annual Statement for the Comprehensive Grant Program (CGP) (Form HUD–52837 or its successor), or the Comprehensive Improvement Assistance Program (CIAP) Budget (Form HUD–52825 or its successor)), but the time period for placing the vacant unit under construction has not yet expired. The IHA must place the vacant unit under construction within two Federal Fiscal Years (FFYs) after the FFY in which the modernization funds are approved.

\* \* \* \* \*

3. Section 950.720 would be amended by revising paragraph (b), to read as follows:

**§ 950.720 Other costs.**

\* \* \* \* \*

(b) (1) *Costs attributable to units approved for deprogramming and vacant* may be eligible for inclusion, but must be limited to the minimum services and protection necessary to protect and preserve the units until the units are deprogrammed. Costs attributable to units temporarily unavailable for occupancy because the units are utilized for IHA-related activities are not eligible for inclusion. In determining the PFS operating subsidy, these units shall not be included in the calculation of Unit Months Available. Units approved for deprogramming shall be listed by the IHA, and supporting documentation regarding direct costs attributable to such units shall be included as a part of the Performance Funding System calculation in which the IHA requests operating subsidy for these units. If the IHA requires assistance in this matter, the IHA should contact the HUD Field Office.

(2) Units approved for nondwelling use to promote economic self-sufficiency services and anti-drug activities are eligible for operating subsidy under the conditions provided in this paragraph (b)(2), and the costs attributable to these units are to be included in the operating budget. If a unit satisfies the conditions stated below, it will be eligible for subsidy at the rate of the AEL for the number of months the unit is devoted to such use. Approval will be given for a period of no more than 3 years. HUD may renew the approval to allow payments after that period only if the IHA can demonstrate that no other sources for paying the non-utility operating costs of the unit are available. The conditions the unit must satisfy are:

(i) The unit must be used for either economic self-sufficiency activities



directly related to maximizing the number of employed residents or for anti-drug programs directly related to ridding the development of illegal drugs and drug-related crime. The activities must be directed toward and for the benefit of residents of the development.

(ii) The IHA must demonstrate that space for the service or program is not available elsewhere in the locality and that the space used is safe and suitable for its intended use or that the resources are committed to make the space safe and suitable.

(iii) The IHA must demonstrate satisfactorily that other funding is not available to pay for the non-utility operating costs. All rental income generated as a result of the activity must be reported as income in the operating subsidy calculation.

(iv) Operating subsidy may be approved for only one site (involving one or more contiguous units) per public housing development for economic self-sufficiency services or anti-drug programs, and the number of units involved should be the minimum necessary to support the service or program. Operating subsidy for any additional sites per development can only be approved by HUD Headquarters.

(v) The IHA must submit a certification with its Performance Funding System Calculation that the units are being used for the purpose for which they were approved and that any rental income generated as a result of the activity is reported as income in the operating subsidy calculation. The IHA must maintain specific documentation of the units covered. Such documentation should include a listing of the units, the street addresses, and project/management control numbers.

(3) Long-term vacant units that are not included in the calculation of Unit Months Available are eligible for operating subsidy in the Requested Budget Year at the rate of 20 percent of the AEL. Allowable utility costs for long term vacant units will continue to be funded in accordance with § 950.715.

\* \* \* \* \*

4. In § 950.725, paragraph (b)(3) would be revised, to read as follows:

**§ 950.725 Projected operating income level.**

(b) \* \* \*

(3) *Projected Occupancy Percentage.* The IHA shall determine its projected percentage of occupancy for all Project Units (Projected Occupancy Percentage), as follows:

(i) *General.* Using actual occupancy data collected before the start of the budget year as a beginning point, the IHA will develop estimates for its

Requested Budget Year (RBY) of: how many units the IHA will have available for occupancy; how many of the available units will be occupied and how many will be vacant, and what the average occupancy percentage will be for the RBY. The conditions under which the RBY occupancy percentage will be used as the projected occupancy percentage for purposes of determining operating subsidy eligibility are described below.

(ii) *High Occupancy IHA—No Adjustments Necessary.* If the IHA's RBY Occupancy Percentage, calculated in accordance with § 950.760, is equal to or greater than 97%, the IHA's Projected Occupancy Percentage is 97%. If the IHA's RBY Occupancy Percentage is less than 97%, but the IHA demonstrates that it will have an average of five or fewer vacant units in the requested budget year, the IHA will use its RBY Occupancy Percentage as its projected occupancy percentage.

(iii) *Adjustments in Determining Occupancy.* If the IHA's RBY Occupancy Percentage is less than 97% and the IHA has more than 5 vacant units, the IHA will adjust its estimate of vacant units to exclude vacant units undergoing modernization and units that are vacant due to circumstances and actions beyond the IHA's control. After making this adjustment, the IHA will recalculate its estimated vacancy percentage for the RBY.

(A) *High Occupancy IHA after adjustment.* If the recalculated vacancy percentage is 3% or less (or the IHA would have five or fewer vacant units), the IHA will use its RBY Occupancy Percentage as its projected occupancy percentage.

(B) *Low Occupancy IHA—adjustment for long-term vacancies.* If the recalculated vacancy percentage is greater than 3% (or more than 5 vacant units), the IHA will then further adjust its RBY Occupancy Percentage by excluding from its calculation of Unit Months Available (UMAs), all units that have been vacant for longer than 12 months that are not vacant units undergoing modernization or are not units vacant due to circumstances and actions beyond the IHA's control.

(iv) *Low Occupancy IHA after all adjustments.* An IHA that has determined its RBY Occupancy Percentage in accordance with paragraph (b)(iii)(B) of this section will be eligible for operating subsidy as follows:

(A) Long-term vacancies removed from the calculation of UMAs will be eligible to receive a reduced operating subsidy calculated at 20% of the IHA's AEL.

(B) If the recalculated RBY Occupancy Percentage is 97% or higher, the IHA will use 97%.

(C) If the recalculated RBY Occupancy Percentage is less than 97%, but the vacancy rate after adjusting for vacant units undergoing modernization and units that are vacant due to circumstances and actions beyond the IHA's control is 3% or less (or the IHA has five or fewer vacant units), the IHA may use its recalculated RBY Occupancy Percentage as its projected occupancy percentage.

(D) If the recalculated RBY Occupancy Percentage is less than 97% and the vacancy percentage is greater than 3% (or the IHA has more than five vacant units) after adjusting for vacant units undergoing modernization and units that are vacant due to circumstances and actions beyond the IHA's control, the IHA will use 97% as its projected occupancy percentage, but will be allowed to adjust the 97% by the number of vacant units undergoing modernization and units that are vacant due to circumstances and actions beyond the IHA's control. For a small IHA using five vacant units as its occupancy objective for the RBY, the IHA will determine what percentage five units represents as a portion of its units available for occupancy and subtract that percentage from 100%. The result will be used as the IHA's projected occupancy percentage, but the IHA will be allowed to adjust the projected occupancy percentage by vacant units undergoing modernization and units that are vacant for circumstances and actions beyond the IHA's control.

\* \* \* \* \*

5. Section 950.760 would be revised to read as follows:

**§ 950.760 Determining Actual and Requested Budget Year Occupancy Percentages.**

(a) *Actual Occupancy Percentage.* When submitting Performance Funding System Calculations for Requested Budget Years beginning on or after January 1, 1996, the IHA shall determine an Actual Occupancy Percentage for all Project Units included in the Unit Months Available. The IHA shall have the option of basing this option on either:

(1) The number of units occupied on the last day of the month that ends 6 months before the beginning of the Requested Budget Year; or

(2) The average occupancy during the month ending 6 months before the beginning of the Requested Budget Year. If the IHA elects to use an average occupancy under this paragraph (a)(2),

the IHA shall maintain a record of its computation of its Actual Occupancy Percentage.

(b) *Requested Budget Year Occupancy Percentage.* The IHA will develop a Requested Budget Year Occupancy Percentage by taking the Actual Occupancy Percentage and adjusting it to reflect changes up or down in occupancy during the Requested Budget Year due to HUD-approved activities such as units undergoing modernization, new development, demolition, or disposition. If after the submission and approval of the Performance Funding System Calculations for the Requested Budget Year, there are changes up or down in occupancy because of modernization, new development, demolition or disposition that are not reflected in the Requested Budget Year Occupancy Percentage, the IHA may submit a revision to reflect the actual change in occupancy due to these activities.

(c) *Documentation Required to be Maintained.* The IHA must maintain, and upon HUD's request, make available to HUD specific documentation of the occupancy status of all units, including long-term vacancies, vacant units undergoing modernization, and units vacant due to circumstances and actions beyond the IHA's control. This documentation shall include a listing of the units, street addresses, and project/management control numbers.

#### **§ 950.770 [Removed and Reserved]**

6. Section 950.770, Comprehensive Occupancy Plan (COP) Requirements, would be removed and reserved.

7. A new § 950.775 would be added, to subpart J, to read as follows:

#### **§ 950.775 Transition provisions.**

(a) *Treatment of units already under an approved modernization budget.* Vacant units to be rehabilitated under modernization budgets approved in FFY 1995 or prior are subject to the modernization implementation schedule, without extension, previously approved by HUD. It is the intent of HUD not to penalize IHAs that have longer construction schedules in an approved modernization budget.

(b) *Treatment of Existing COPs.* (1) An IHA that on [effective date of final rule] is operating under a Comprehensive Occupancy Plan (COP) approved by HUD under § 950.770, as that section existed before [effective date of final rule] may, until the expiration of its COP, continue to determine its PFS eligibility under the provisions of part 950 effective on [1 day before effective date of final rule]. If the IHA does not elect to continue to determine its PFS

eligibility using its COP, the IHA's PFS eligibility will be calculated in accordance with this part.

(2) HUD will not approve any extensions of existing COPs.

8. A new § 950.777 would be added to subpart J, to read as follows:

#### **§ 950.777 Waivers.**

(a) *Documentation for Waiver.* A waiver may be granted in accordance with § 999.101 of this chapter. Any request for a waiver should include documentation that the IHA has made best efforts to correct the problems underlying its excess vacancies and could not correct the problems in a cost-effective manner.

(b) *Effect of Rescission.* If there is a rescission of appropriated funds that reduces the level of Comprehensive Grant Program funding in an approved Annual Statement under the CGP, to the extent that the IHA can document that it is not possible to complete all the vacant unit rehabilitation in the IHA's approved Annual Statement, the IHA may seek and HUD may grant a waiver for 1 fiscal year to permit full PFS eligibility for those units approved but not funded.

### **PART 990—ANNUAL CONTRIBUTIONS FOR OPERATING SUBSIDY**

9. The authority citation for part 990 would continue to read as follows:

**Authority:** 42 U.S.C. 1437g and 3535(d).

10. Section 990.102 would be amended by adding definitions for "Long-term vacancy", "Units vacant due to circumstances and actions beyond the PHA's control", and "Vacant unit undergoing modernization"; by revising the definitions for "Unit approved for deprogramming" and "Unit months available"; and by removing the definition for "Vacant, On-Schedule Modernization Units", to read as follows:

#### **§ 990.102 Definitions.**

\* \* \* \* \*

*Long-term vacancy.* This term means the same as it is used in the definition of "Unit Months Available" in this section.

\* \* \* \* \*

*Unit approved for deprogramming.* (1) A dwelling unit for which HUD has approved the PHA's formal request to remove the dwelling unit from the PHA's inventory and the Annual Contributions Contract but for which removal (i.e., deprogramming) has not yet been completed; or

(2) A nondwelling structure or a dwelling unit used for nondwelling purposes that the PHA has determined

will no longer be used for PHA purposes and that HUD has approved for removal from the PHA's inventory and Annual Contributions Contract.

*Unit months available.* Project Units multiplied by the number of months the Project Units are available for occupancy during a given PHA fiscal year. For purposes of this part, a unit is considered available for occupancy from the date established as the End of the Initial Operating Period for the Project until the time the unit is approved by HUD for deprogramming and is vacated or is approved for nondwelling use. A unit will be considered a long-term vacancy and will not be considered available for occupancy in any given PHA Requested Budget Year if the PHA determines that:

(1) The unit has been vacant for more than 12 months at the time the PHA determines its Actual Occupancy Percentage;

(2) The unit is not either:

(i) A vacant unit undergoing modernization; or

(ii) A unit vacant for circumstances and actions beyond the PHA's control, as these terms are defined in this section; and

(3) The PHA determines that it will have a vacancy percentage of more than 3 percent and will have more than five vacant units, for its Requested Budget Year, even after adjusting for vacant units undergoing modernization and units that are vacant for circumstances and actions beyond the PHA's control, as defined in this section. (Reference in this part to "more than five units" or "fewer than five units" shall refer to a circumstance in which five units equals or exceeds 3 percent of the number of units to which the 3 percent threshold is applicable.)

*Units vacant due to circumstances and actions beyond the PHA's control.* Dwelling units that are vacant due to circumstances and actions that prohibit the PHA from occupying, selling, demolishing, rehabilitating, reconstructing, consolidating or modernizing vacant units and are beyond the PHA's control. For purposes of this definition, circumstances and actions beyond the PHA's control are limited to:

(1) *Litigation.* The effect of court litigation such as a court order or settlement agreement that is legally enforceable. An example would be units that are being held vacant as part of a court-ordered or HUD-approved desegregation plans.

(2) *Laws.* Federal or State laws of general applicability, or their implementing regulations. Units vacant only because they do not meet

minimum standards pertaining to construction or habitability under Federal, State, or local laws or regulations will not be considered vacant due to circumstances and actions beyond the PHA's control.

(3) *Changing market conditions.* For example, small PHAs that are located in areas experiencing population loss or economic dislocations may face a lack of demand in the foreseeable future, even after the PHA has taken aggressive marketing and outreach measures.

(4) *Natural disasters.*

(5) *Insufficient funding* for otherwise approvable applications made for Comprehensive Improvement Assistance Program (CIAP) funds.

(6) *RMC funding.* The failure of a PHA to fund an otherwise approvable RMC request for Federal modernization funding;

(7) *Casualty losses.* Delays in repairing damage to vacant units due to the time needed for settlement of insurance claims.

\* \* \* \*

*Vacant unit undergoing modernization.* Except as provided in § 990.119(a), a vacant unit in an otherwise viable project (as determined using the indicia in § 970.6 of this chapter), when the project is undergoing modernization that includes work that is necessary to reoccupy the vacant unit, and in which one of the following conditions is met:

(1) The unit is under construction (i.e., the construction contract has been awarded or force account work has started); or

(2) The treatment of the vacant unit is included in a HUD-approved modernization budget (e.g., the Annual Statement for the Comprehensive Grant Program (CGP) (Form HUD-52837 or its successor), or the Comprehensive Improvement Assistance Program (CIAP) Budget (Form HUD-52825 or its successor)), but the time period for placing the vacant unit under construction has not yet expired. The PHA must place the vacant unit under construction within two Federal Fiscal Years (FFYs) after the FFY in which the modernization funds are approved.

11. Section 990.108 would be amended by revising paragraph (b), to read as follows:

**§ 990.108 Other costs.**

\* \* \* \*

(b) (1) Costs attributable to units approved for deprogramming and vacant may be eligible for inclusion, but must be limited to the minimum services and protection necessary to protect and preserve the units until the units are deprogrammed. Costs

attributable to units temporarily unavailable for occupancy because the units are utilized for PHA-related activities are not eligible for inclusion. In determining the PFS operating subsidy, these units shall not be included in the calculation of Unit Months Available. Units approved for deprogramming shall be listed by the PHA, and supporting documentation regarding direct costs attributable to such units shall be included as a part of the Performance Funding System calculation in which the PHA requests operating subsidy for these units. If the PHA requires assistance in this matter, the PHA should contact the HUD Field Office.

(2) Units approved for nondwelling use to promote economic self-sufficiency services and anti-drug activities are eligible for operating subsidy under the conditions provided in this paragraph (b)(2), and the costs attributable to these units are to be included in the operating budget. If a unit satisfies the conditions stated below, it will be eligible for subsidy at the rate of the AEL for the number of months the unit is devoted to such use. Approval will be given for a period of no more than 3 years. HUD may renew the approval to allow payments after that period only if the PHA can demonstrate that no other sources for paying the non-utility operating costs of the unit are available. The conditions the unit must satisfy are:

(i) The unit must be used for either economic self-sufficiency activities directly related to maximizing the number of employed residents or for anti-drug programs directly related to ridding the development of illegal drugs and drug-related crime. The activities must be directed toward and for the benefit of residents of the development.

(ii) The PHA must demonstrate that space for the service or program is not available elsewhere in the locality and that the space used is safe and suitable for its intended use or that the resources are committed to make the space safe and suitable.

(iii) The PHA must demonstrate satisfactorily that other funding is not available to pay for the non-utility operating costs. All rental income generated as a result of the activity must be reported as income in the operating subsidy calculation.

(iv) Operating subsidy may be approved for only one site (involving one or more contiguous units) per public housing development for economic self-sufficiency services or anti-drug programs, and the number of units involved should be the minimum necessary to support the service or

program. Operating subsidy for any additional sites per development can only be approved by HUD Headquarters.

(v) The PHA must submit a certification with its Performance Funding System Calculation that the units are being used for the purpose for which they were approved and that any rental income generated as a result of the activity is reported as income in the operating subsidy calculation. The PHA must maintain specific documentation of the units covered. Such documentation should include a listing of the units, the street addresses, and project/management control numbers.

(3) Long-term vacant units that are not included in the calculation of Unit Months Available are eligible for operating subsidy in the Requested Budget Year at the rate of 20 percent of the AEL. Allowable utility costs for long term vacant units will continue to be funded in accordance with § 990.107.

\* \* \* \*

12. In § 990.109, paragraph (b)(3) would be revised, to read as follows:

**§ 990.109 Projected operating income level.**

(b) \* \* \*

(3) *Projected Occupancy Percentage.* The PHA shall determine its projected percentage of occupancy for all Project Units (Projected Occupancy Percentage), as follows:

(i) *General.* Using actual occupancy data collected before the start of the budget year as a beginning point, the PHA will develop estimates for its Requested Budget Year (RBY) of: how many units the PHA will have available for occupancy; how many of the available units will be occupied and how many will be vacant, and what the average occupancy percentage will be for the RBY. The conditions under which the RBY occupancy percentage will be used as the projected occupancy percentage for purposes of determining operating subsidy eligibility are described below.

(ii) *High Occupancy PHA—No Adjustments Necessary.* If the PHA's RBY Occupancy Percentage, calculated in accordance with § 990.117, is equal to or greater than 97%, the PHA's Projected Occupancy Percentage is 97%. If the PHA's RBY Occupancy Percentage is less than 97%, but the PHA demonstrates that it will have an average of five or fewer vacant units in the requested budget year, the PHA will use its RBY Occupancy Percentage as its projected occupancy percentage.

(iii) *Adjustments in Determining Occupancy.* If the PHA's RBY Occupancy Percentage is less than 97% and the PHA has more than 5 vacant

units, the PHA will adjust its estimate of vacant units to exclude vacant units undergoing modernization and units that are vacant due to circumstances and actions beyond the PHA's control. After making this adjustment, the PHA will recalculate its estimated vacancy percentage for the RBY.

(A) *High Occupancy PHA After Adjustment.* If the recalculated vacancy percentage is 3% or less (or the PHA would have five or fewer vacant units), the PHA will use its RBY Occupancy Percentage as its projected occupancy percentage.

(B) *Low Occupancy PHA—Adjustment for Long-Term Vacancies.* If the recalculated vacancy percentage is greater than 3% (or more than 5 vacant units), the PHA will then further adjust its RBY Occupancy Percentage by excluding from its calculation of Unit Months Available (UMAs), all units that have been vacant for longer than 12 months that are not vacant units undergoing modernization or are not units vacant due to circumstances and actions beyond the PHA's control.

(iv) *Low Occupancy PHA After All Adjustments.* A PHA that has determined its RBY Occupancy Percentage in accordance with paragraph (b)(iii)(B) of this section will be eligible for operating subsidy as follows:

(A) Long-term vacancies removed from the calculation of UMAs will be eligible to receive a reduced operating subsidy calculated at 20% of the PHA's AEL.

(B) If the recalculated RBY Occupancy Percentage is 97% or higher, the PHA will use 97%.

(C) If the recalculated RBY Occupancy Percentage is less than 97%, but the vacancy rate after adjusting for vacant units undergoing modernization and units that are vacant due to circumstances and actions beyond the PHA's control is 3% or less (or the PHA has five or fewer vacant units), the PHA may use its recalculated RBY Occupancy Percentage as its projected occupancy percentage.

(D) If the recalculated RBY Occupancy Percentage is less than 97% and the vacancy percentage is greater than 3% (or the PHA has more than five vacant units) after adjusting for vacant units undergoing modernization and units that are vacant due to circumstances and actions beyond the PHA's control, the PHA will use 97% as its projected occupancy percentage, but will be allowed to adjust the 97% by the number of vacant units undergoing modernization and units that are vacant due to circumstances and actions beyond the PHA's control. For a small

PHA using five vacant units as its occupancy objective for the RBY, the PHA will determine what percentage five units represents as a portion of its units available for occupancy and subtract that percentage from 100%. The result will be used as the PHA's projected occupancy percentage, but the PHA will be allowed to adjust the projected occupancy percentage by vacant units undergoing modernization and units that are vacant for circumstances and actions beyond the PHA's control.

\* \* \* \* \*

13. Section 990.117 would be revised to read as follows:

**§ 990.117 Determining Actual and Requested Budget Year Occupancy Percentages.**

(a) *Actual Occupancy Percentage.* When submitting Performance Funding System Calculations for Requested Budget Years beginning on or after January 1, 1996, the PHA shall determine an Actual Occupancy Percentage for all Project Units included in the Unit Months Available. The PHA shall have the option of basing this option on either:

(1) The number of units occupied on the last day of the month that ends 6 months before the beginning of the Requested Budget Year; or

(2) The average occupancy during the month ending 6 months before the beginning of the Requested Budget Year. If the PHA elects to use an average occupancy under this paragraph (a)(2), the PHA shall maintain a record of its computation of its Actual Occupancy Percentage.

(b) *Requested Budget Year Occupancy Percentage.* The PHA will develop a Requested Budget Year Occupancy Percentage by taking the Actual Occupancy Percentage and adjusting it to reflect changes up or down in occupancy during the Requested Budget Year due to HUD-approved activities such as units undergoing modernization, new development, demolition, or disposition. If after the submission and approval of the Performance Funding System Calculations for the Requested Budget Year, there are changes up or down in occupancy because of modernization, new development, demolition or disposition that are not reflected in the Requested Budget Year Occupancy Percentage, the PHA may submit a revision to reflect the actual change in occupancy due to these activities.

(c) *Documentation Required to be Maintained.* The PHA must maintain, and upon HUD's request, make available to HUD specific documentation of the

occupancy status of all units, including long-term vacancies, vacant units undergoing modernization, and units vacant due to circumstances and actions beyond the PHA's control. This documentation shall include a listing of the units, street addresses, and project/management control numbers.

**§ 990.118 [Removed and Reserved]**

14. Section 990.118, Comprehensive Occupancy Plan Requirements, would be removed and reserved.

15. Section 990.119 would be revised to read as follows:

**§ 990.119 Transition provisions.**

(a) *Treatment of Units Already Under an Approved Modernization Budget.* Vacant units to be rehabilitated under modernization budgets approved in FFY 1995 or prior are subject to the modernization implementation schedule, without extension, previously approved by HUD. It is the intent of HUD not to penalize PHAs that have longer construction schedules in an approved modernization budget.

(b) *Treatment of Existing COPs.* (1) A PHA that on [effective date of final rule] is operating under a Comprehensive Occupancy Plan (COP) approved by HUD under § 990.118, as that section existed before [effective date of final rule] may, until the expiration of its COP, continue to determine its PFS eligibility under the provisions of part 990 effective on 1 day before effective date of final rule. If the PHA does not elect to continue to determine its PFS eligibility using its COP, the PHA's PFS eligibility will be calculated in accordance with this part.

(2) HUD will not approve any extensions of existing COPs.

16. A new § 990.121 would be added to subpart A, to read as follows:

**§ 990.121 Waivers.**

(a) *Documentation for Waiver.* A waiver may be granted in accordance with § 999.101 of this chapter. Any request for a waiver should include documentation that the PHA has made best efforts to correct the problems underlying its excess vacancies and could not correct the problems in a cost-effective manner.

(b) *Effect of Rescission.* If there is a rescission of appropriated funds that reduces the level of Comprehensive Grant Program funding in an approved Annual Statement under the CGP, to the extent that the PHA can document that it is not possible to complete all the vacant unit rehabilitation in the PHA's approved Annual Statement, the PHA may seek and HUD may grant a waiver for 1 fiscal year to permit full PFS

eligibility for those units approved but not funded.

Dated: June 27, 1995.

**Joseph Shuldiner,**

*Assistant Secretary for Public and Indian Housing.*

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